MONTANA
Management View

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State implements mid-year changes in benefit plan

Rapidly rising medical costs in state government's aging workforce have triggered unprecedented mid-year changes in the employee insurance plan. Two changes taking effect this month are: **(1)** each agency's increased contribution to the self-funded group benefits plan will take effect now rather than next January to help pay escalating claims and re-establish the plan's reserves, and; **(2)** the plan now includes a $100 deductible for each covered individual for retail prescription drug purchases and a $50 deductible for certain dental services. State employees received notice of these changes in early June.

The insurance plan year runs January through December. The mid-year increase in the amount state agencies contribute to the plan came through a last-minute amendment to House Bill 13. Employee premiums will not increase until January 2004 and January 2005, when the state's contribution toward each employee's insurance premium will increase by $44 per month and $50 per month respectively. The amendment to House Bill 13 requires agencies to start paying the higher amount six months early in both plan years to pay claims and help increase the plan's reserve levels as required by law. Even after employees start receiving the in-pocket benefit of the new state share in January of both years, employees who pay extra to insure their families will pay more out of pocket over the next two years. It is too early to estimate how much more.

Highlights

Required reserves are the funds set aside to pay for health care costs that employees have incurred, but that have not yet been billed or paid. For more than a decade the group benefits plan maintained a separate "premium stabilization reserve" in excess of the level required to cover the unknown claims liability. The State Personnel Division and the State Employee Group Benefits Advisory Council (SEGBAC) grew concerned the "excess reserve" was at risk of being diverted by the Legislature for uses unrelated to the group benefits plan. Insurance administrators and advisors made a conscious decision in 1997 to start spending the stabilization reserve on employee medical claims, with a goal of exhausting the fund by the end of the 2002 plan year. At that point, the minimum reserve levels required by law were projected to remain stable. The new insurance rates for the next two years were set at a level expected to generate sufficient income to cover claims and operating expenses. During 2002, however, health care costs and use escalated, and the plan experienced a substantial and unforeseeable rise in claim costs.

The State Personnel Division, SEGBAC and the state's actuarial consultants will continue to analyze claims and expenses from the latter part of last year to determine the cause and its effect on future projections. It is clear the increases are an indication of escalating costs. We will continue to update state managers on this topic in future issues of *Management View*.

Understanding "insubordination" –

Arbitrators' rulings offer insight to managers when confronting the behavior

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Simply stated, insubordination is a refusal to obey a direct order from a supervisor.

In most cases, this definition works well. It works well because of the universally-adopted principle that employees are to "obey now, grieve later." But there are a number of cases in which the simple definition must be expanded. Here are some sample cases.

1. The one giving the order is not a supervisor. In the classic definition, the order has to come from someone with authority to give the order. It does not have to be a supervisor, even though in most cases it is. But take this case: A security guard orders the grievant to walk through the security entrance a second time. The grievant refuses. Whether the guard has supervisory authority is not an issue. Instead, the arbitrator will look at the circumstances, including the practices and understandings of the parties.

2. The supervisor uses open-ended words. Take the case where the supervisor says, "would you go and clean that?" Or the even more vague request, "I want you to do that." Union advocates argue to the arbitrator that the employer must use verbs, signifying a command, such as "I order you. . ." or "I direct you. . ." This is not always true. In some workplaces, supervisors speak in military language of command and obey. But in many workplaces, the language is more open-ended. Thus, arbitrators will not look at what words are used, but whether the average employee (average in the community or average in that workplace) would understand that a direct order was being given.

3. The consequences of disobeying the order are vague. Union advocates also argue that the supervisor must inform the grievant that discipline will result if the order is not obeyed. The general rule, however, is broader than that. It is more that the consequences of disobedience must be known to the employee. Moreover, arbitrators take a practical approach. They look at the context. The circumstances of the case inform the arbitrator about whether the employee knew there would be consequences. There is an inverse relationship here: the more significant and clear the order, the less need for the supervisor to tell the employee the consequences of disobeying. In other words, ordinary persons assume there are consequences to disobeying a legitimate order.

4. The grievant claims he did not refuse the order. In these cases, the issue is often what language is generally used in the work setting. At a major convention center, the f--- word was used as a noun, verb and an exclamation of approval ("F---ing - A"). While such language would be inappropriate in many settings such as schools and where employees deal with the public, at this convention center, the f--- word and its variations were not even sexual banter, just crude communication.

In an actual case, a supervisor gave a direct order to the grievant who replied, "F--- this." The grievant was charged with insubordination, even though he later completed the task. The arbitrator overturned the discipline and stated that if the grievant had replied "F--- you" and walked away, only to do the job later, the insubordination charge would have been upheld (it is an affront to the supervisor's authority). But in a setting where, f--- is used as an affirmative response (*e.g.,* when a fellow worker expresses approval of sitting next to you at lunch) the response, "F--- this s---" does not constitute insubordination. This case points out how circumstances (including salty language) affect the outcome of a case.

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Coincidence or pattern? Employee fired twice for insubordination generates ample case law

Ever heard this reply to a clear work directive? "That's not in my job description." You're not alone. Fortunately, one of the most firmly established principles in labor relations is management's right to direct the workforce *(Grievance Guide; 10th Edition; Bureau of National Affairs)*. Insubordination is a serious offense because it violates the employer's right to direct and assign work. Arbitrators generally recognize that a work place is not debating society, therefore, they usually hold employees to the "obey now, grieve later" rule. The principal exception is where carrying out an order would unreasonably endanger the employee's health or safety. Two Montana cases interestingly involved the same employee and provided insight into the balance between employee and employer obligations. Both cases showed that while an employee has the duty to follow orders, management has the duty to ensure orders are clear, understood and reasonable. Arbitrators have overturned discipline where management failed to provide the employee advance notice of the disciplinary consequences of refusing to follow an order.

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Case #1 – Discharge from county employment in 1981

The grievant was a clerical employee classified as "accounting clerk II" in the clerk and recorder's office of a Montana county. Because of staffing shortages, the employer frequently assigned the grievant to do some duties previously performed by an "accounting clerk IV." The grievant frequently complained about the new assignments. When asked to perform certain tasks, she often replied, "That's not in my job description," or, "not if I'm not being paid for it." The elected county clerk and recorder frequently directed the grievant to perform tasks, as did a lower-level immediate supervisor. Sometimes the grievant complied; other times she did not. Eventually, the immediate supervisor issued the grievant a written warning notifying her that refusal to perform tasks is considered insubordination and will result in discipline or discharge. When the supervisor handed the grievant the written warning, the grievant replied, "Then why don't you fire me?" The supervisor calmly replied, "Because I don't have the authority." The grievant replied, "Then why don't you get your g— d----d authority?" and she walked away from him. In the meantime, and eventually problematic, the

supervisor of the supervisor (the clerk and recorder) was unaware of the written warning and had already decided to discharge the grievant for prior insubordination. The county discharged the employee based on the clerk and recorder's decision, and the union grieved the discharge for lack of just cause.

Arbitrator Thomas L. Levak reinstated the employee with full back pay and benefits. In his decision, he stated the grievant had been told to perform many tasks, but had never been expressly warned these were direct orders with discharge hanging in the balance. The arbitrator said the immediate supervisor's written warning was reasonable, however, by the time of the written warning, the supervisor's boss had already decided to fire the grievant.

"Some disagreements over job assignments are to be expected," Arbitrator Levak wrote. "It does no damage to the 'work then grieve' rule to allow an employee to voice an objection where he feels an order violates the collective bargaining agreement or an established custom and practice. It is in recognition of that right to protest that a supervisor who believes his authority is being challenged must take steps to make sure the employee understands that he is being given an order. Stated another way, an employee should have the right to correct his initial refusal or failure before he is summarily discharged. That right is sometimes referred to as a warning procedure. It may also be termed an affirmation of that fact that a direct order is being given and that the employee must obey and protest no further.

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Regardless of the terminology, the principle is that an employee who is protesting an order must have it made clear to him that he is, in fact, being given a definite order that he must immediately obey. The requirement is abundantly fair, as the penalty is so severe. Because the collective bargaining agreement permits summary discharge, there must be no question that a clear order was given. In addition to making it clear that an order is being given, the supervisor who believes his authority is being challenged must also make it clear that further disobedience will result in discipline or discharge. An employee must be made aware that his job is in jeopardy."

Case #2 – Discharge from state employment in 1995

The above-referenced grievant later went to work for a state agency. From late 1993 to early 1995, management issued the grievant several written warnings for "defiant and insubordinate" behavior. Her inappropriate conduct included: refusing to prepare reports in a specific manner required by management; leaving work without notice or approval; refusing to perform various tasks as assigned; refusing to use an automobile that had been assigned to her; and failing to complete an important project within a specified deadline. Management followed progressive discipline and ultimately suspended her without pay for three days in late 1994. Management expressly warned her that further insubordination would result in her employment discharge.

In early 1995 the grievant's supervisor directed her to revise a project that she had completed in a certain manner. She responded that she had completed the project in the manner required by law, and she told the supervisor there was no legal basis to revise the project in the manner directed by the supervisor. The supervisor replied that he had checked with the legal department and that the directive was legal and appropriate. The grievant replied, "I don't believe you checked with anyone." She refused the directive. The employer discharged her for insubordination. The union grieved the discharge for lack of just cause.

Arbitrator William L. Corbett denied the grievance and upheld the discharge. The fact management provided the grievant clear warning that further insubordination would result in discharge helped management prevail in the grievance arbitration.

Arbitrator Corbett wrote, "It is well recognized that a charge of employee insubordination involves the following elements: (1) An order or directive was given the employee, (2) the employee understood the order or directive, (3) the employee willfully disobeyed or disregarded the order or directive, (4) the employee's refusal to obey the order or directive was not justified. Regarding the element of (4), 'justification,' arbitral decisions recognize that in situations other than where the employee reasonably fears personal injury or safety, and where the employee is directed to commit an act prohibited by external law, the employee must comply with the directive. In an organization like the Department, it is not the province of each employee to determine the legality of every action of its employer. The project assigned to the Grievant required (certain actions of the Grievant) the Department was willing to defend in court, if necessary. An employee may not refuse to carry out an assigned task merely because his/her reading of the law may not allow the employer to successfully defend the action."

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/css

Paula Stoll, Chief	**444-3819**	pstoll@state.mt.us
Kevin McRae	**444-3789**	kmcrae@state.mt.us
Butch Plowman	**444-3885**	bplowman@state.mt.us
Ruth Anne Alexander	**444-3892**	ralexander@state.mt.us